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SUPREME COURT, U.S.

NO. 03-1326

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

ARTHUR M. HAWKINS,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

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QUESTIONS PRESENTED

The Petitioner herein respectfully moves this Court for an order (1) granting certiorari after its June 21, 2004 denial as this Court's June 24, 2004 decision in *Blakely v. Washington*, 2004 U.S. Lexis 4573, is applicable to the sentencing of petitioner who received a sentence nine and one-half years over that permitted under *Blakely* and/or (2) that this Court remand petitioner's case back to the Seventh Circuit Court of Appeals for a *Blakely* analysis under the record which currently exists.

Questions Presented:

1. Whether application of the *Blakely* v. Washington decision extends to an aggrieved petitioner who's conviction has become final.

(a) Whether Petitioner is entitled to rehearing given that his petition for certiorari was denied 3 days before the release of *Blakely v. Washington*, and as a result did not previously include a *Blakely* issue for this Court's review.

(b) Whether Petitioner is entitled to a remand to the Seventh Circuit Court of Appeals given that he raised *Blakely* related issues below without the benefit of this Court's June 24, 2004 decision.

(c) Whether the Petitioner's sentence exceeds the statutory maximum of 0 to 6 months based on an additional nine and one-half year increase by a judge absent a jury finding of beyond a reasonable doubt on additional facts.

THE PARTIES

The caption in this case contains the name of all parties.

1. THE DECISION IN *BLAKELY V. WASHINGTON*

Pursuant to Rule 44 this Petition for Certiorari is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

On June 21, 2004 Petitioner's Writ of Certiorari was denied on the venue issue raised regarding Circuit splits. The venue issue was raised in this Court because of the existing law in support and in conflict.

Petitioner's *Blakely* argument was omitted because the state of the law pre *Blakely* was that a Judge imposed sentence, nine and one-half years in excess of that authorized, did not violate the Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) because the relevant statutory maximum had not been exceeded.

Petitioner filed a Petition for Certiorari with this Court on March 12, 2004. On May 19, 2004 the United States filed a brief in opposition. On June 1, 2004 the case was distributed for conference on June 17, 2004.

Three days after Hawkins petition was denied on June 21, 2004, this Court rendered the single most important decision regarding punishment since the enactment of the Sentencing Reform Act of 1984. This Court in *Blakely v. Washington* clarified the statutory maximum issue addressed in *Apprendi v. New Jersey* holding "In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the

law makes essential to the punishment", *Bishop*, supra, §87, at 55, and the judge exceeds his proper authority."

Although the majority in *Blakely* did not specifically address the federal sentencing guidelines, one need look no further than the dissents of Justices O'Connor and Breyer to realize *Blakely* is applicable to federal guidelines cases. Plain and simple, any fact that increases the upper limits on the sentencing judges discretion must be charged in the indictment and submitted to the jury for a finding .

Blakely is an intervening circumstance of a substantial or controlling effect. It is clear that Blakely is applicable for cases not yet final. What is less clear is retroactive application of *Blakely* in collateral attacks on sentences. Attempts by defendants to collaterally attack sentences pursuant to this Court's holding in *Apprendi* met with virtually no success since this Court did not address the issue of retroactivity. The same arguments are anticipated in response to *Blakely* collateral attack petitions. Dependent upon this Court's action on Petitioner's rehearing his conviction may be deemed by the lower court to be final thereby barring *Blakely* relief. There are countless defendants in custody whose sentences were imposed in violation of *Blakely* that will be denied relief absent a ruling from this Court on the retroactive application of *Blakely*.

In other words in this case warranted relief for Arthur Hawkins consistent with *Blakely* may be denied because his petition for certiorari was denied three days before *Blakely* was released.

The interests of justice require the requested relief herein as the interest in finality of litigation must yield where the interests of

justice would make unfair the strict application of the rules. *United States v. Ohio Power Company* , 353 U.S. 98, 99 (1957). This Court has previously recognized that a new controlling Supreme Court decision presents an intervening circumstance justifying the grant of a rehearing. See *Zap v. United States*, 330 U. S. 800 (1947); *Bradley Mining Co., v. Boice*, 345 U. S. 932 (1953); *West v. Northwest Airlines, Inc.*, 505 U.S. 1201 (1992); and *Friend v. United States*, 517 U. S. 1152 (1996).

2. THE SENTENCE IS THE TAIL WHICH WAGS THE DOG.

Petitioner's ten year sentence was imposed based on 26 levels of sentencing factors that were not charged in the indictment or decided by a jury of his peers beyond a reasonable doubt.

Specifically, Petitioner was convicted in a jury trial of two counts of wire fraud resulting in exposure to a ten year term. The indictment made no reference to the enhancements nor did the jury verdict include any findings, reasonable doubt or otherwise, as to this aggregate 26 level sentencing enhancement increase. If Petitioner were sentenced today under the same facts the aggregate 26 level sentencing enhancements would be barred under *Blakely*. If Petitioner's case were still at the Seventh Circuit Court of Appeals the aggregate 26 level sentencing enhancements would be prohibited based on the omissions in his indictment and general verdict form. See *United States v. Booker*, 03-4225, 2004 U.S. App. LEXIS 14223 (July 9, 2004). Petitioner should find himself in no worse position today. *Blakely* was not available to him at sentencing, on appeal, or the original petition for certiorari. He did, however, object to the enhancements below.

Petitioner was convicted of two Counts under 18 U.S.C. §1343 and 1346. Under the United States Sentencing Guidelines (hereafter U.S.S.G.) the base offense level was level 6, Criminal History Score of I, and guidelines of 0 to 6 months. However, at sentencing the District Judge, in reliance on a presentence report prepared by a probation officer made preponderance findings on the following thereby increasing Petitioner's base offense 26 levels from a level 6 to a level 32.

Petitioner's sentence is clearly illegal based on the holding in *Blakely*. The following is an outline of the Judge imposed sentencing factors that resulted in the nine and one-half year increase from the original base level of 6 and guidelines of 0 to 6 months.

U.S.S.G. §2F1.1(b)(1((M)	_____+	12
U.S.S.G. §2F1.1(b)(2)(A)	_____+	2
U.S.S.G. §2F1.1(b)(3)	_____+	2
U.S.S.G. §2F1.1(b)(5)(C)	_____+	2
U.S.S.G. §3B1.1(a)	_____+	4
U.S.S.G. §3B1.3	_____+	2
U.S.S.G. §3C1.1	_____+	2

The nine and one-half year increase in Petitioner's punishment is in contravention of this Courts holding in *Blakely*. The nine and one-half years was added based on a probation officers opinion with input from the United States Attorney and decided by a Judge based on a preponderance of the evidence.

This Court's holding in *Blakely* held that "Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The

Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours." 4 Blackstone, Commentaries on the Laws of England, 343 (1769)." This proposition is of no less import to Petitioner.

This Court's explanation of the reason the Framers of the Constitution put a jury trial guarantee in the constitution was their unwillingness to trust the Government. Surely a case which takes a six month sentence to a 10 year sentence is one that should be decided by a jury.

As noted by this Court in *Blakely*, *Apprendi* critics would favor the "tail which wags the dog" notion espoused by this Court in *McMillian v. Pennsylvania*, 477 U.S. 79 (1986). In other words a sentence should not go too far otherwise exceeding the judicial estimation of the proper role of the Judge. Even under this analysis, objective scrutiny reveals that Petitioner's nine and one half year increase is clearly the tail which wags the dog.

It is clear that Petitioner's claim is valid. The question is what remedy should be granted. The matter could be remanded to the Seventh Circuit or decided in this Court. If this Court is disinclined to grant either remedy, this may well be the case where this Court decides the issue of retroactivity of *Blakely* and its predecessor *Apprendi*.

In support of Petitioner's position he directs the Court to the holding of the Seventh Circuit in *United States v. Booker*, 03-4225, 2004 U.S. App. LEXIS 14223 (July 9, 2004). The *Booker* Court, the same Court that would pass on Petitioner's sentence challenge, agree with the four dissenting justices in *Blakely* that

Blakely dooms the guidelines in so far as they require that sentences be based on facts found by a Judge. In noting limitations on sentencing judges, per *Blakely*, the Seventh Circuit stated "All it cannot do under *Blakely* is take away from the defendant the right to demand that the [quantity] be determined by the jury rather than by the Judge, and on the basis of proof beyond a reasonable doubt (Opinion, page 4).

This principle should be no less applicable in a case such as Petitioner's wherein monetary losses and numerous other sentencing factors were determined by a Judge and not a jury beyond a reasonable doubt.

It is clear if Petitioner's case were remanded to the Seventh Circuit, his sentence would necessarily be reduced at least nine and one-half years pursuant to *Blakely* and *Booker*.

Additionally, subsequent to the release of *Booker* in the Seventh Circuit on July 9, 2004 wherein the Court held the Sentencing Guidelines unconstitutional, the Fifth Circuit in *United States v. Pineiro*, 03-3043, 2004 U.S. App. LEXIS 14259 (July 12, 2004) ruled to the contrary which now creates a split in the Circuits on this issue.

If Petitioner's conviction is deemed final by this Court's denial of certiorari on June 21, 2004, three days before the release of *Blakely* on June 24, 2004 and retroactive application of *Blakely* is foreclosed on collateral review, Petitioner like many other federal prisoners will be required to serve an excessive sentence in violation of his right to a jury trial and in contravention of this Courts holdings in *Blakely and Apprendi*. Such an unjust result is precisely what the Framers of our constitution sought to avoid by ensuring that the Judges authority to sentence derives wholly from the jury's verdict.

CONCLUSION

For the reasons set forth above, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment.

/s/Susan G. James, Esq.
Counsel of Record for Arthur M. Hawkins

CERTIFICATE OF COUNSEL

As Counsel for Petitioner, I hereby certify that the Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

/s/Susan G. James, Esq.
Counsel of Record for Arthur M. Hawkins